Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Ex Parte Communication

Ex Parte Filing By David Robertson, President, STIC.NET,LP.

On Monday, August 10, 2003, a meeting was held with Scott Marcos and Robert Cannon of the Office of Strategic Planning and Policy Analysis concerning the following docket:

Appropriate Regulatory Treatment for Broadband
Access to the Internet over Cable facilities
Notice of Proposed Rulemaking
CS Docket No. 02-52

The participants included:

David Robertson, President,Texas ISP Association, Robert Cannon, and Scott Marcos.

The primary discussion centered around the topic of "the lack of competition in the broadband market". Discussion centered around the , at that time pending, complaint that STIC.NET was planning to submit to the FCC concerning Time Warner's anti-competitive activities in the broadband arena. That complaint was subsequently filed with the Secretary, FCC, and Mr. Ken Ferree of the Media Bureau on August 22, 2003.

A copy of the complaint is attached to this document.

Sincerely,

David Robertson
TISPA
2438 Boardwalk
San Antonio, Texas 78217

(210) 477-3283

W. Kenneth Ferree September 22, 2003
Media Bureau, Chief
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: Complaint, Time Warner/AOL Merger, Divestiture Request

Mr. Ferree:

Thank you for your willingness to meet with our firm (STIC.NET, LP) concerning Time Warner/America On Line's (TW/AOL) failure to adhere to their merger agreement . Per our conversation in your office on August 11, I have contacted TW/AOL, supplied them with our "intent to file a complaint", and had talks with them concerning our complaint. While I would like to report that progress was made, I can only report that, according to TW/AOL, our complaint is groundless.

<u>Summary of our complaint:</u>

Time Warner / AOL desired to merge and proceeded to attempt to attain approval from the Federal Communications Commission (FCC) to do so. The FCC agreed to allow the merger, providing "conditions" were in place to stop the merger from inducing an anti-competitive impact on the market. The FCC relied on a consent decree constructed by the FTC to provide the needed market restraints on the merger. The FTC, was un-successful in creating/negotiating a document that was not wrought with loopholes. The FTC consent decree, and thereby, the contracts that TW / AOL provided to independent ISPs to sign, have been totally useless in providing the restraints sought by your agency. The result is as of the end of March:

TW/AOL/ROADRUNNER had approximately 95% of the total subscribers to the TW/AOL network, Earth Link had 5% , and all the other ISPS (12 of us) had five one hundredths of one per cent of the market (approximately 1385 customers out of a total of 2,894,405. EarthLink's 130,000 clients were possible as we evaluate the situation were due to their being included, by name, in the FTC order as an ISP that TW/AOL would be required to complete a contract with, in order for the merger to be approved. The remainder of the ISPs were subject to contracts of adhesion.

Total Road Runner	2,600,000
Total AOL	190,000
Total Earthlink	130,000
Total Other ISP	1,400
Total subscribers	2,894,405
TW/AOL (INCLUDING ROSDRUNNER)	96.3929%
EARTHLINK	4.4914%
ALL OTHER MISPs	0.0484%
STIC.NET ALONE	0.0045%

Below, I submit some of the verbiage of the FCC order, followed by our evaluation of their compliance of that portion:

13. From a competition standpoint, vertical integration can create potential problems when the integrated company has market power at one or more of the levels of integration.

1. As our supplier, AOL/TW engages in classical PRICE SQUEEZE/PREDATORY PRICING SCHEMES TO KILL ANY HOPE OF COMPETITION IN THE MARKETPLACE. While STIC pays in the neighborhood of $39 per month for the circuit ($39 is the published cost in Wall Street Journal article by other ISP), AOL/TW charges $19.95 per month for the same product, RETAIL. When a client completes their “promotional period”, calls AOL/TW and attempts to transfer service to STIC, they are offered an extension of the promotion for another group of months, or until the end of the year. This is discriminatory access to mobility between ISPs.

2. STIC advertising must be coordinated 60 days prior to launch, supposedly to allow AOL/TW time to prepare for possible increases in demand. In reality, it has allowed AOL/TW to coordinate its' San Antonio mass transit bus campaign to begin on the same day ours started. Due to their market power, ours was dwarfed. If not

for their use of our marketing plans, we might have had a possibility of bringing consumers additional alternatives in their choice of providers.

3. After being provided with the slicks for tri-city post card mailing, and having 120,000 printed, 5x8 inches two sided color, AOL/TW launched their $19.95 promotion to correspond with first of three mailings. We still retain 80,000 post cards, realizing that they are useless against the ongoing price squeeze.

4. AOL/TW routinely neglects to contact STIC newly signed on customers to schedule installation of service. At the same time, untrue comments are input into the tracking system STIC must utilize to follow-up on installation progress.

15. We recognize that there is a difference between intervention to preserve a level of competition that will allow a market to operate effectively and the kind of substantial regulatory intervention that is required to compensate in markets where sufficient competition is lacking.

We feel that we are at the substantial regulatory intervention stage at this point.

Mergers can … threaten its (the market's) continued existence, eliminating competitors or creating opportunities to disadvantage rivals in anticompetitive ways. We are guided both by the desire to avoid intervention and the realization that some degree of timely intervention to preserve competition may avoid a later ***need for more onerous intervention to either regulate where competition has disappeared or to attempt to reintroduce competition once it has been eliminated.***

17. . . the FTC found that the merger would harm competition in the residential Internet access marketplace and imposed conditions on the merging parties requiring them to afford access to Time Warner's cable plant to unaffiliated ISPs, requiring them not to discriminate against unaffiliated content under certain circumstances, requiring AOL Time Warner to market AOL's DSL services in the same manner and at the same retail price in Time Warner cable areas as in other areas, and to hold separate Road Runner, a cable ISP, from AOL's ISP service until AOL Time Warner offers an unaffiliated ISP on all AOL Time Warner cable systems.

In the majority of of TW/AOL's cable system markets (of the 20 markets involved with the order), there are 14 of of the markets that do not reflect one subscriber sold by any of the non TW/AOL ISPs (with the exception of EarthLink) for the month of March. Only one ISP (New York Connect) touts over 50 sales for the first quarter of this year.

18. . .we find that the proposed merger would give AOL Time Warner the ability and incentive to harm consumers in the residential high-speed Internet access services market by blocking unaffiliated ISPs' access to Time Warner cable facilities and by otherwise

discriminating against unaffiliated ISPs in the rates, terms and conditions of access. To remedy this harm, this Order conditions approval of the merger on certain conditions relating to AOL Time Warner's contracts and negotiations with unaffiliated ISPs.

Our contract was one of adhesion, and our negotiating ability with absolutely no leverage, resulted in all ISPs being dealt a wholesale price for goods that makes it prohibitive, relatively impossible, to provide consumers with a competitive product. TW/AOL might as well have made our cost per subscriber a flat $1,000 per month, because after a certain level of predatory pricing, the cost becomes mute. To drown under a +/- $20.00 price squeeze is no more deadly than drowning under a $980 price squeeze.

21. The Commission's analysis of public interest benefits and harms includes, but is not limited to, an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles. ***To find that a merger is in the public interest, therefore, the Commission must "be convinced that it will enhance competition."***

If allowed to compete in the market, Independent ISPs would bring the same benefits to this broadband offering as it has in the dial-up arena for years. In the dial-up market, where the incumbent has not been able to suppress competition, the independent ISPs have been responsible for virtually all the innovations since the early days. An example is low, flat rate pricing. Our company has offered unlimited dial-up access for $10.00 per month since 1995.

22. Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act." These broad aims include, among other things, ensuring the existence of a nationwide communications service, available to everyone; **implementation of Congress's pro-competitive, deregulatory national policy framework designed to open all telecommunications markets to competition**

This national policy has been eliminated from this market.

23. The Supreme Court has found that decentralization of information production serves values that are central to the First Amendment. Indeed, the Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: It
has long been a basic tenet of national communications policy that **"the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."**

Accordingly, the Court had "no difficulty" in concluding that the Commission's interest in "promoting widespread dissemination of information from a multiplicity of sources" is "an important governmental interest."

The concept was laudable, but implementation has not occurred.

47. . . (1) that AOL Time Warner make available to subscribers at least one unaffiliated ISP on Time Warner's cable systems before AOL itself begins offering service; that AOL Time Warner allow two other unaffiliated ISPs onto its cable systems within 90 days after AOL's commencement of service; and that AOL Time Warner negotiate in good faith for non-discriminatory access to its cable systems with any ISPs requesting such access;

<u>Good Faith is absent in that the contracts were "of adhesion", and so embodied with predatory pricing of the wholesale product that ISPs can not compete.</u>

. . . The FTC also required, in a separate order, that AOL Time Warner hold separate Road Runner and AOL until such time that it offers over all of its cable properties an unaffiliated ISP.

<u>TW/AOL almost immediately revised their business model to push Road Runner at the expense of AOL (charges $54.95 for almost the same product that Roadrunner charges $29.99).</u>

51. . . The Applicants aver that their merger will lead to a solution to the "cable access" issue, and to the provision of multiple ISPs over the cable platform. In particular, AOL and Time Warner point to their Memorandum of Understanding Regarding Open Access Business Platforms (the "MOU"), into which the Applicants entered shortly after agreeing to merge, as a "turning point" in the effort to promote a "vigorously competitive marketplace for broadband Internet services."

<u>Vigorous is a tough word to understand here. At a loss of over $108 per year (comparing TW/AOL pricing of $29.95 to ISPs WHOLESALE price of $39.00), If ISPs sold at our wholesale cost, we would loose over $1,000 over a 10 year relationship with our client. (TW/AOL claims that the promotional price of $29.95 is temporary, but we have taped conversations with their staff extending the Promotion" to the end of the calendar year, with a promise of another promotion at that time to take their "deal" continue.)</u>

54. . . AOL is by far the largest narrowband ISP and has been the leading advocate and supporter of the "open access" movement.

<u>They flipped their position on this as soon as they got what they wanted from regulators.</u>

56. . . absent mitigating conditions, the proposed merger would undermine competition in the provision of residential high-speed Internet access services.

We also find that the proposed merger would give AOL Time Warner both the ability and the incentive to discriminate against unaffiliated ISPs . . . and to obtain exclusive or preferential carriage for its own Internet access services from other cable providers. ***<u>As a result, the proposed merger would frustrate statutory goals and Commission policies designed to ensure that the American public has access to a diversity of information sources and to widely available advanced services.</u>***

This has happened.

57. We conclude, however, that these potential harms will be substantially averted by the terms of the FTC Consent Agreement.

We would agree, had the agreement not been so crafted as to circumvent the goals of the order.

164 The FTC Consent Agreement requires, among other provisions discussed below,

(1) that AOL Time Warner make available to subscribers at least one unaffiliated ISP on Time Warner's cable systems before AOL itself begins offering service;

that AOL Time Warner allow two other unaffiliated ISPs onto its cable systems within 90 days after AOL's commencement of service; and

that AOL Time Warner negotiate in good faith for non-discriminatory access to its cable systems with any ISPs requesting such access;

Because we conclude that the FTC Consent Agreement will not avert all the potential harms to the public interest that would result from the proposed merger, we impose certain additional conditions to ensure that AOL Time Warner does not disadvantage unaffiliated ISPs on its cable systems through several indirect means not squarely addressed by the FTC Consent Agreement.

This has occurred as well. It will be discussed below.

59. Our authority to address the merger's impact on competition for high-speed Internet access services derives from our statutory duty to ensure that the proposed transaction serves the public interest. . .

. . . in adopting the 1996 Act, Congress established a clear national policy to "promote the continued development of the Internet" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services unfettered by Federal or State regulation."

. . .Concurrently, Congress charged the Commission with "encouraging the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."

. . .The principal purpose of such capability is to facilitate the use of advanced services, of which residential high-speed Internet access services are one kind. Finally, ***"it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."***

This is our goal as well.

61. We find that, absent mitigating conditions, the proposed transaction would interfere with each of the objectives discussed above. The merger would imperil the continued existence of a vibrant and competitive free market for development of the Internet because AOL Time Warner would have the ability and the incentive to discriminate against unaffiliated ISPs on its own cable platform, and to obtain exclusive carriage for its Internet access services on the networks of other cable providers.

These outcomes would also thwart the deployment of advanced telecommunications capability to all Americans by limiting choice in the realm of residential high-speed Internet access services and, potentially, by threatening the survival of ISPs unaffiliated with AOL Time Warner as consumers migrate from narrowband to high-speed services.

These outcomes would likewise diminish the public's ability to obtain information from diverse sources, as customers of the nation's second largest cable operator (AOL Time Warner) would have little choice but to access the Internet through service providers affiliated with that entity.

Furthermore, as we discuss below, discrimination by AOL Time Warner against unaffiliated ISPs in the market for residential high-speed Internet access services would facilitate discrimination by that company in favor of its own broadband content, a result that could constrain consumers' access to the "widest possible" array of information over high-speed technology.

If, in contrast, AOL Time Warner were obligated to carry multiple, unaffiliated ISPs over its network on non-discriminatory terms, those ISPs could serve as an alternative outlet for non-AOL Time Warner content, making it more likely that AOL Time Warner's affiliated ISPs would feature such content themselves to remain competitive. For all of these reasons, we conclude that our duty to ascertain that the proposed transaction serves the public interest requires us to condition our approval . . .

<u>The attempt to condition your approval has not been ignored. It has been vigorously circumvented.</u>

62. Internet access services consist principally of connectivity to the Internet provided to end users. These end users may be residential consumers, businesses, content providers, or application providers.

<u>We desire to be allowed to service business clients as well. There is no justification for our being excluded from selling to business clients. We request TW/AOL be forced to allow us access to these circuits as well.</u>

80. . . Unless appropriate restrictions are placed on the proposed merger, AOL Time Warner will have both the ability and the incentive to: (a) discriminate against unaffiliated ISPs on its own cable network;

<u>agree</u>

83 . . . The record suggests that if AOL Time Warner were permitted to discriminate against unaffiliated ISPs in the terms and conditions of access to its cable network, many such ISPs would be unable to compete effectively, permitting the merged entity and its affiliated ISPs to attain a market-dominant position for residential high-speed Internet access services within one to two years.

TW/AOL maintains +66% of the high speed market in the areas it competes with

DSL and 95% of the market where it competes with ISPs on its' network.

85. Several commenters contend that a combined AOL Time Warner would engage in anticompetitive behavior in an attempt to dominate the market for residential high-speed Internet access services. In particular, commenters express concern that AOL Time Warner would discriminate against unaffiliated ISPs . . .

by refusing to carry them on its cable network;

by offering them carriage on unfavorable terms that would render it impossible for them to remain in business;

commenters were right.

86. Our conclusion that conduct restrictions are necessary to address the potential harms described above rests on two findings: (I) that the merged company would have the incentive to discriminate against unaffiliated ISPs on its cable network and (ii) that it would have ability to do so in a manner that would undermine competition in the relevant market. We begin by noting that AOL itself has argued in other contexts that a vertically integrated cable operator offering high-speed Internet access services would have precisely such incentive and ability.

They are experiencing their intended outcome.

The record in this proceeding points to several factors that would give the merged firm an incentive to discriminate. AOL, with 26 million narrowband subscribers, has a manifest incentive to migrate those subscribers to high-speed Internet access services as an ever-greater proportion of Internet content falls into the “broadband” category. AOL has a complementary incentive to ensure that as its subscribers switch to high-speed access services, they remain customers of AOL (or one of its affiliates) and do not select a competing high-speed ISP. Excluding unaffiliated ISPs from the merged company’s cable network, or discriminating against them in more subtle ways, would help achieve that objective. AOL Time Warner would also have an incentive to discriminate against unaffiliated ISPs for an additional, independent reason: the natural inclination to maximize the value of its cable network by converting its captive base of Time Warner cable customers into customers of ISPs affiliated with the merged firm.

This objective, too, would be facilitated by discriminating against unaffiliated ISPs

with respect to carriage on AOL Time Warner cable networks.

87. We also find that AOL Time Warner would have the ability to discriminate against unaffiliated ISPs. **This is well-documented in the record.** As earlier mentioned, the proposed transaction would give the merged company ownership of the nation’s second largest cable network. Such ownership would enable AOL Time Warner to deny unaffiliated ISPs carriage on this network at will.

Due to the size of the network and its dominance in the geographic areas to which it extends, AOL Time Warner’s ownership rights would also empower the merged company to deal with unaffiliated ISPs requesting carriage by offering them “take it or leave it” agreements based on terms that would render it difficult if not impossible for these ISPs to provide service over cable profitably.

<u>This is what has happened. We plea for assistance.</u>

And of course, AOL Time Warner’s physical control over the network would allow it to limit the online features and functionalities of unaffiliated ISPs or to degrade their quality of service, conceivably in ways that would escape easy detection.

<u>Really hard to prove.</u>

88. Finally, we note that the proposed merger would strengthen AOL Time Warner’s ability to discriminate against unaffiliated ISPs on its cable network by bringing AOL and Road Runner under common ownership.

Road Runner is the nation’s second largest high-speed ISP. The elimination of potential competition between AOL and Road Runner in the market for residential high-speed Internet access services would significantly enhance AOL Time Warner’s power in this market. And by adding to the merged firm’s lead in subscribership for residential high-speed Internet access services, it would diminish AOL Time Warner’s incentive to adopt an “open access” regime with respect to its cable network.

<u>Agree</u>

90. Notwithstanding the Applicants’ reasoning, we are not convinced that AOL Time Warner would need to refrain from discriminating against unaffiliated ISPs on its own cable platform in order to secure carriage for AOL Internet services on the platforms of other cable providers. We find it implausible that AOL Time Warner -- with the leading brand among ISPs as well as the largest library of proprietary content in the world at its disposal -- would

be unable to leverage these resources and others to obtain carriage for AOL Internet services on the facilities of unaffiliated cable operators.

92. We find that if unaffiliated ISPs were permitted to offer their services over AOL Time Warner's cable network on non-discriminatory terms and conditions, the merger's potential to undermine competition in the relevant market would be mitigated.

<u>We can only prove this if we are allowed to compete as described above.</u>

Unaffiliated ISPs in areas served by AOL Time Warner's cable network would have the opportunity to compete fairly on price and quality, and residential consumers in these areas would be able to choose a high-speed ISP based on the best combination of those characteristics. Market forces, not control of a bottleneck facility, would determine the firms that would succeed in the relevant market, thereby enhancing efficiency and consumer welfare.

<u>We can only prove this if we are allowed to compete as described above.</u>

93. However, we are not convinced that the MOU alone will achieve these goals and mitigate the potential harms to competition that we have described. Broadly speaking, our concerns are twofold. First, even if it were legally enforceable, the MOU by itself would fail to offer unaffiliated ISPs adequate protection against discrimination by a merged AOL Time Warner. Second, the MOU on its own is not legally enforceable, and reports regarding the terms of access that Time Warner has proposed to certain unaffiliated ISPs cast doubt on the company's commitment to implement the principles underlying the MOU in a manner that would avert the merger's potential deleterious effects on the relevant market. We discuss each of these concerns in turn.

94. Although the MOU represents a commendable statement of principles, it does not address several specific areas in which unaffiliated ISPs connecting to Time Warner cable networks could be treated less favorably than affiliated ISPs. For example, it seems likely that in many cases, Time Warner cable subscribers who desired cable-based high-speed Internet access services would call Time Warner with their initial inquiries. **Such inquiries would give Time Warner the opportunity to steer prospective customers toward affiliated ISPs (such as AOL, CompuServe, or Road Runner), a practice the MOU does nothing to prohibit.**

<u>We have recordings to prove this is happening. These have been turned over to the FTC and the overseer.</u>

The FTC Consent Agreement further stipulates that the FTC pre-approve the agreements between AOL Time Warner and each of the three unaffiliated ISPs to be granted immediate access to Time Warner cable systems, and that the agreements themselves include detailed safeguards protecting these ISPs against discrimination by AOL Time Warner on the basis of affiliation.

The FTC has commented that they were “out lawyered” from beginning to end on the contract areas. ISPs were unable to negotiate in good faith, due to TW/AOL making it clear that if we did not like the contracts, others in the market would take them. In defense of the FTC, the consent agreement as well as the individual contracts were assumed to be between parties that had the same goals, and not with one of the participants conspiring to dominate the market through bad acts.

Additionally, the FTC Consent Agreement requires AOL Time Warner to negotiate in good faith, and enter into arms' length commercial agreements, with any other unaffiliated ISPs seeking access to its cable systems; and it forbids AOL Time Warner from declining to negotiate or enter such agreements, or from imposing terms and conditions in such agreements, based on ISPs' non-affiliation with the merged firm.

One should ask how Texas Net, a competitor of STIC.NET, feels about this. Texas Net was denied any access to the network.

97. We are convinced that the foregoing requirements will substantially ensure that unaffiliated ISPs are able to offer their services over AOL Time Warner's cable system on non-discriminatory terms and conditions. However, we are concerned that AOL Time Warner will have insufficient incentives to enter contracts with local or regional ISPs that are unaffiliated with the merged firm. We note that the FTC Consent Agreement requires AOL Time Warner to negotiate in good faith with any unaffiliated ISP seeking access to its cable systems. Therefore, we reiterate here that AOL Time Warner must engage with local and regional ISPs in a good faith, non-discriminatory manner.

They did not, as we see it, discriminate between ISPs. They pretty much were deceptive with all of us.

98. . . Commenters have also expressed concern that AOL Time Warner would preclude ISPs on its cable systems from establishing direct billing relationships with subscribers, even when those ISPs were responsible for acquiring the subscribers in the first place.

These measures, even if imposed in a facially neutral manner on affiliated and unaffiliated ISPs, would in fact disadvantage unaffiliated ISPs alone: affiliated ISPs would suffer neither from placement of Time Warner content on their first screen nor from the absence of a direct billing relationship with subscribers, as any revenue they “lost” from these measures would be made up by the parent company. Accordingly, we will impose narrowly tailored conditions, described below, to prevent AOL Time Warner from disadvantaging unaffiliated ISPs on its cable systems through such indirect means.

We are still not allowed billing or source based routing for our clients, a policy that hampers greatly our ability to serve our clients.

We are convinced that discrimination against unaffiliated ISPs with respect to technical performance would be ***sufficiently harmful to such ISPs that a remedy is warranted.***

The SLCE data base is prime evidence of technical discrimination. More discussion on this matter later in this document.

Accordingly, we will impose a condition requiring AOL Time Warner, in all contracts with unaffiliated ISPs for access to its cable networks, to warrant that it will not discriminate on the basis of affiliation with respect to technical performance.

Did not work.

100. Finally, we also impose two additional conditions. First, we will prohibit AOL Time Warner from restricting the ability of current or prospective customers to select and initiate service from any unaffiliated ISP that has contracted for access to the merged firm's cable systems; and we will require AOL Time Warner to provide customers who contact Time Warner cable representatives seeking Internet access services with a neutral means of selecting an ISP (that is, a means that does not discriminate in favor of affiliated ISPs on the basis of affiliation).

Neutral should not include their present actions of stating that they are faster than STIC.NET by a ratio of 2.0 to 1.5 or stating that a photograph that requires 30 seconds to download on STIC.NET will require only 15 seconds to download on TW/AOL. We have provided recordings of both these false claims to the FTC and overseer.

Billing: AOL Time Warner shall permit each ISP to have a direct billing arrangement with those high-speed Internet access subscribers to whom the ISP sells service. AOL Time Warner may offer a billing service to any Participating ISP, but shall not

require any ISP to purchase this service as a condition of obtaining access.

Ignored by TW/AOL.

241. However, the record also contains evidence that AOL has a history of negotiating exclusionary deals once it is in its economic interest to do so.

Evidenced by our contract.

291. AOL also asserts that its commitment to the cable broadband platform in and of itself will spur development of competing platforms. AOL asserts that the Commission itself has recognized this pattern, ***"understanding that competition among rival technologies is one of the primary focuses that drives deployment of broadband services."***

Predatory pricing and practices of TW/AOL IS HARMING THE END USERS.

313. These potential public interest benefits, however, do not outweigh the serious potential public interest harms we have identified above. For example, while the merger may well stimulate the development and deployment of new services, if the merger in fact diminishes competition and consumer choice with respect to advanced “IM-based” services and residential high-speed Internet access service, as we predict, then the merger’s potential stimulation of the development of new services will not guarantee that consumers will benefit from innovation, price competition, or diversity of choices with respect to these services. Finally, these potential harms threaten to diminish consumers’ access to the widest possible array of information and information sources.

<u>agree</u>

314. Accordingly, we find it necessary to impose remedial conditions to mitigate the merger’s potential harms and in order to ensure that consumers enjoy the benefits the merger promises to offer.

335. IT IS FURTHER ORDERED that all references to AOL, Time Warner, and AOL Time Warner in this Order shall also refer to their respective officers, directors, and employees, as well as to any affiliated companies, and their officers, directors, and employees, except as otherwise noted.

<u>Road Runner is the culprit in most of our allegations.</u>

We are listing below a group of concerns that were recently provided to the FTC. We have not yet heard back on any actions taken/proposed on any of them.

1. STIC.NET purchases a circuit for almost $40 per month (I can not state the exact price in a possibly public document due to NDA) while TW/AOL RETAILS THE SAME CIRCUIT FOR $29.95 per month till the end of a calendar year and promises that the user can jump to another “promotional offer” at the end of December, thereby avoiding the retail price indefinitely. (STIC.NET in no way desires prices to increase for the consumer, but desires to be able to purchase at a reasonable wholesale price. In that their Promo price is good indefinitely, they are not using it as a marketing tool, but as a RETAIL PRICE that guarantees ownership of the market.
2. STIC.NET is depicted as slower than their product by customer service representatives, in direct violation of the FCC order when we are described as slower than Road Runner. (we have produced the recordings of this activity and turned it over to Naomi and Dale)

3. We get turned down when we request circuits for our clients with a status at the client's home of "unavailable" . However, if TW/AOL is contacted directly with a request for a new ROADRUNNER account or AOL account, it is granted. (This is due to our being forced to use a non-real time, third party controlled database of prospective users of the network. A database that is oft times inaccurate and not updated in a timely manner. TW/AOL utilizes a real-time data base and gets "real" information.
4. Installers SLAM clients to Roadrunner and argue with the new customer about STIC and Roadrunner (and EarthLink) being the same, inferring that there is "no reason to change".
5. Road Runner sells to business clients and prohibits STIC.NET from selling to anyone but residential clients. There is no reason for this discrimination.
6. TW/AOL has paid commissions only three times in the past 13 pay periods, in direct violation of our agreement (contract) with them to receive payment for active accounts on a monthly basis, thirty days in arrears.
7. We have not been given the option for utilizing "source based routing", required by Consent decree within 6 months of contract. This severely limits STIC.NET from differentiating itself from Road Runner.
8. We have not been allowed to bill our clients, and even worse, our clients that get billed through Road Runner, have to sort through their ads for win-back promotions in direct competition with our service. Once a client with STIC.NET, further marketing activities for High Speed Internet Access in the Bills, or by phone numbers acquired through the use of CUSTOMER PROPRIETORY NETWORK INF-ORMATION (CPNI), should be prohibited.

9. The SERVICE LOCATOR COMMERCE ENGINE (SLCE) database going down for days at a time, thereby not allowing STIC any loop Qualification ability, or the ability to monitor existing work orders.

10. TWC's refusal (through inactivity) to follow-up on our placed orders to schedule an installation with our client. They continue to not make contact with client until the client is deleted for non-activity.
11. TWC "unhooks" client at time of physical install with comments to client such as "Ya did want the $22.45 per month special, didn't ya?" The client then questions the "special" and finds that it is a ROADRUNNER ONLY special. Client is then un-hooked from STIC and hooked up with Roadrunner.
12. TW/AOL indicated, emphatically, at group meetings between TWC and STIC that TWC would not utilize predatory pricing or price squeeze schemes to monopolize market. TW/AOL went on to say that TWC wouldn't be allowed to operate in that manner anyway, due to the Federal Trade Commission's overseer, Mr. Dale Hattfield.
13. We must provide our own IP addresses (about $6,000 per year), while TWC supplies them for Road Runner and AOL. (This is hearsay, and not proven at this time.)
14. We are not allowed to do any IP Telephony without getting their approval 90 days in advance, and are prohibited from doing any IP Telephony that "COULD" cause the government to re-classify the services rendered to Telecommunications Service Provider. Since the government COULD do anything, this effectively bars STIC from this new revenue stream.

15. Our clients are subject to possibly discriminatory credit standards, causing deposits to be required. This may be subjective.

16. STIC is prohibited from purchasing advertising on the TWC cable Television system, because we are “competitors”. This item is hearsay. We can not afford to use television, if it were available.

Mr. Ferree, it is our hope that you may see appropriate to take a fresh look at the merger, and find that based on the lack of cooperation that has been displayed by TW/AOL, that you will destroy the merger between them. Short of divestiture, it is our hope that we can be compensated for the monopolistic bad acts on their part and secure a competitive role if future deployments of broadband over cable.

Please contact me with any requests for more information. We shall not survive this crusade to end competition without your assistance in upholding FCC order as described above. It is a shame that the fears of the FCC have been so dramatically come to pass. It is our hope that the ability for competition as guaranteed by your order and the FTC consent decree is still a possibility. Thank you for your consideration.

Sincerely,

David Robertson
President
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San Antonio, Texas 78217

(210) 477-3283 office
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President
Texas Internet Service Provider's Association

DRR

cc: Paul Bartlett, Chris Coco, Pruett Moore III